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CRIMINAL LAW

A recodification¹ of the criminal laws of Indiana has been provided for in Chapter 360 of the Acts of 1947. A commission of three members to be known as the State Penal and Correctional Survey Commission is charged with making the recodification and their report is to be filed with the Governor not later than November 15, 1948.

Bribery. The previous bribery² statutes covered public officers³ and officers and employees of common carriers.⁴ Chapter 17 of the Acts of 1947 provides, first, that those⁵ who give, or attempt to give, a bribe⁶ to any professional or amateur⁷ participant⁸ in a sporting event, contest or exhibition commit a crime. The actor must intend that the person to whom he gives or offers to give the bribe will corruptly conduct himself⁹ so as to influence the outcome of the sporting event. A previous statute requiring a similar criminal intent was upheld as sufficiently definite.¹⁰ The body of case law accumulated under the existing statutes should, in the most part, be applicable to the act under consideration.

1. The last recodification of Indiana criminal law was in Ind. Acts 1905, c. 169.
2. "The crime of bribery is a felony . . . and is one against public justice. It has to do with a public officer and pertains to his behavior in office." *Williams v. State*, 188 Ind. 283, 296, 123 N.E. 209, 213 (1919).
3. Ind. Stat. Ann. (Burns, Repl. 1942) §10-601, §10-602, §10-603.
4. Id §10-604, §10-605.
5. "Any person, firm, corporation, partnership or organization, or any agent or employee of any person, corporation, firm, partnership or organization" Ind. Acts 1947, c. 17. Other states condense the list of those covered by stating "whoever," New York Laws 1941, c. 753.
6. "...any money, bribe or thing of value" Ind. Acts 1947, c. 17.
7. Some states do not distinguish between professional and amateurs. Illinois makes a contest "where admission is charged" the criterion. Ill. Rev. Stat. (1945) c. 38, §83 a.
8. "...contestant, coach, referee, umpire, or official" Ind. Acts 1947, c. 17.
9. "... shall corruptly or dishonestly umpire, manage, direct, referee, supervise, judge, preside or officiate at, or participate in any sporting event. . . ." Ind. Acts 1947, c. 17.
11. "The offense defined by the statute [Ind. Stat. Ann. (Burns, Repl. 1942) §10-601] is clear and easily comprehended. If any person holding an office of trust . . . solicits money . . . 'to influence him with respect to his official duty, or to influence his action, vote, opinion or judgement in any matter pending or that might legally come before him' such person commits the offense" *Vehling v. State*, 210 Ind. 17, 19, 196 N. E. 107, 108 (1935).

There is a "double standard" of punishment upon conviction. The act provides for imprisonment for not less than one year nor more than five years. A fine of not less than five hundred dollars nor more than two thousand dollars may be added. There follows a provision for a fine in any sum not exceeding one thousand dollars or for imprisonment in the county jail for not more than six months, or both. The latter provision is to be imposed at the discretion of the court or jury. The first standard makes the crime a felony while the second standard sets out punishment as for a misdemeanor.¹¹ The court or jury trying the case has a wide discretion in fixing the actor's punishment. If they choose the first "standard" the actor must be imprisoned, to which penalty may be added a fine. But if they choose the second he may be fined without being subject to a prison or jail term. It seems that the choice is left wholly to the court or jury trying the case, and they are given no criterion on which to base a conviction under the first standard rather than the second.

The second section of the Act covers the participant¹² of a sporting contest who receives, or attempts to receive a bribe with the intention that he shall corruptly conduct himself¹³ so as to influence the result of the contest.

The "double standard" of punishment is again set forth. The first consists of imprisonment for not less than one year nor more than three years, to which may be added a fine of not less than two hundred dollars nor more than five hundred dollars. At the discretion of the court or jury the second standard may be imposed. The second standard is a fine not exceeding one thousand dollars, or imprisonment in the county jail for not more than six months, or both. A proviso¹⁴ makes it mandatory upon the court to adopt the second

11. "All crimes and public offenses which may be punished with death or imprisonment in the state prison shall be denominated felonies; all (and) all other offenses against the criminal law shall be denominated misdemeanors." Ind. Stat. Ann. (Burns, Repl. 1942) §9-101.

12. "Any contestant, coach, referee, umpire, or official, professional or amateur . . . " Ind. Acts 1947, c. 17.

13. ". . . or shall corruptly umpire, manage, direct, referee, supervise, judge, preside, officiate or participate at any sporting event, contest or exhibition . . . " Ind. Acts 1947, c. 17.

14. "Provided: That if any contestant . . . be an amateur and not a professional he may be subjected to punishment, on conviction, only as provided and within the limits last hereinbefore set forth.

standard for the amateur contestant who receives or attempts to receive a bribe. It is presumably optional as to the professional.

Dangerous Flying. Chapter 42 provides for punishment of any person who operates¹⁵ an aircraft in a careless or reckless manner so as to endanger the life or property of another. A person who operates an aircraft with reckless disregard for the safety, property, or rights of others is also included in the act. Before the passage of this act, flying so low as to endanger persons on the surface and trick or acrobatic flying over a thickly inhabited area were prohibited.¹⁶ Chapter 42 of the Acts of 1947 reenacts those prohibitions.

Operating¹⁷ an aircraft under the influence of intoxicating liquors, narcotics, or other habit-forming drugs is also prohibited. Similar provisions are found in the existing motor vehicles law.¹⁸ A pilot or passenger of an aircraft in flight who drops anything which might create any hazard to persons or property violates the law and is subject to punishment under the act. A person convicted under this act is guilty of a misdemeanor, and may be fined not more than two hundred fifty dollars or imprisoned for not more than six months, or both. It is also possible that a violation of this statute might be considered negligence per se.¹⁹

Since "careless or reckless operation" of an aircraft is the conduct necessary for a conviction, it is important to determine the meaning of this word formula. Carelessness connotes negligence. Negligent conduct²⁰ differs from reck-

Ind. Acts 1947, c. 17. The word "may" is by implication converted into "shall" by the words following it. i.e. "only as provided and within the limits last hereinabove set forth. . . ." For a discussion of the use of verbs in statutory drafting see, 2 Sutherland, "Statutory Construction" (3d ed. 1943) §4928.

15. Operating an aircraft on the ground or water, as well as in the air, is included in the act.
16. Ind. Stat. Ann. (Burns, 1933) § 14-109. The 1947 act amends this section.
17. See n. 15 supra.
18. Ind. Stat. Ann. (Burns, 1933) § 47-451, § 47-2001 are examples.
19. See Harper, "Law of Torts" (1st ed. 1933) § 78. Query if discharging cargo or parachuting in the case of emergency would be a defense defeating recovery?
20. ". . . negligence implies inadvertence i.e., that the actor was completely unaware of the dangerousness of his behavior although it was unreasonably increasing the risk of the occurrence of a proscribed harm." Hall, "General Principles of Criminal Law" (1947) 216.

less conduct.²¹ The question becomes: is the act punishing negligence as well as recklessness, or is it using the words "careless" and "reckless" as synonyms? If they are synonyms, which is to prevail? This becomes important in analysing the *mens rea* required. Since negligence implies merely inadvertance, a standard based on negligence negates a criminal intent. To hold that a person who is not a "reasonably prudent man" is a criminal, nullifies one of the fundamental principles of criminal law. It is submitted that criminal liability should be based upon voluntary acts only. If the legislature intends that negligence is to be the basis of penal liability, that fact should be stated in unequivocal language. Criminal law is one field in which ambiguity should not exist.

Trespass—Injury to Property. Chapter 161 provides for the punishment of any person who, without the express consent of the owner, wilfully, mischievously or maliciously disfigures or destroys any geological formation found in any cave. Upon conviction, the actor is to be fined not less than fifty dollars nor more than five hundred dollars, to which may be added imprisonment for not less than ten days, nor more than six months. The new act is an expansion of the present laws on malicious trespass.²²

Convict—Escape from Prison. Chapter 59 sets out the punishment for prisoners who escape from the Indiana State Prison, Indiana Reformatory or the Indiana Women's Prison; or those who escape from the custody of an officer conveying them to one of those penal institutions. The escapee is guilty of a felony and upon conviction shall be sentenced to the institution from which he escaped for not less than one nor more than ten years. The sentence is to commence immediately after the termination of the sentence he was

21. "Between the poles of intentionality and negligence lies recklessness. Recklessness is like the former in that the actor is conscious of a forbidden harm, he realizes that his conduct increases the risk of its occurrence But recklessness differs from intentionality in that the actor does not seek to attain the harm; instead, he believes that the harm will not occur On the other hand, recklessness resembles negligence in that both include an unreasonable increase in the risk of harm. But, as noted, the negligent harm-doer is inadvertant thereto." Hall, "General Principles of Criminal Law" (1947) 217. "Actually recklessness is no more a degree of negligence than is intent. Awareness of increasing the danger separates it completely from the genus of negligence." *Id.* at 232.

22. Ind. Stat. Ann. (Burns, Repl. 1942) § 10-4509.

serving when he escaped. The punishment as set forth is expected to present no constitutional difficulties.²³

The present law eliminates an ambiguity in the old law²⁴ as discovered in a case before the courts in 1943.²⁵ It is now provided that escaping from a prison to which the prisoner was first committed includes: (1) Prisoners who escape while in another institution for treatment after being transferred from the first prison; (2) Prisoners who escape while in another county as a witness or litigant upon court warrant or order, or for any other purpose; (3) Prisoners who escape while working on a prison farm, or elsewhere under the direct control and authority of the institution; (4) Prisoners who escape while en route to or from the institution or while away under any of the above circumstances.

When an officer conveys a prisoner to or from one of the specified institutions, so much of the trip as is within Indiana is to be considered as an entirety. An escape during any part of the trip will be construed to be an escape from the institution to which the prisoner had been committed. Jurisdiction to try and punish the crime set forth in this act is to be in any circuit, superior or criminal court, having criminal jurisdiction, in the county in which the institution is located. Since the legislature defines the crime of escape to include escapes from other than inside the prison²⁶ walls, the provision for laying venue probably does not violate the Indiana Constitution.

Parole. Persons who have been released on parole from the Indiana State Prison, Indiana Women's Prison or the

23. The punishment for an escape was upheld where the punishment was measured by the length of time for which such escaping convict was originally sentenced, to commence at the expiration of the original sentence. The court said, "It is for the legislature to determine what the punishment shall be and in the creation of a statute that body is not held to narrow limits. . . ." *State v. Rardon*, 221 Ind. 154, 161, 46 N. E. (2d) 605, 608 (1943). The provision under consideration by the court was Ind. Stat. Ann. (Burns, Repl. 1942) §10-1807. It is probably repealed by the new act which contains a specific implied repealer.

24. Ind. Stat. Ann. (Burns, Repl. 1942) § 10-1807.

25. *State v. Rardon*, 221 Ind. 154, 46 N. E. (2d) 605 (1943). The court held that an inmate could be guilty of escaping from prison when outside the prison walls. In that case the prisoners were working on a prison farm when they escaped.

26. Ind. Const., Art. I, § 13. See *Workman v. State*, 216 Ind. 68, 23 N.E. (2d) 419 (1940); *Peats v. State*, 213 Ind. 560, 12 N.E. (2d) 270 (1937). cf. *Martin v. State*, 176 Ind. 317, 95 N. E. 1001 (1911).

Indiana Reformatory, and who commit another crime while on that parole, are subject to consecutive sentences under the provisions of Chapter 61. Upon conviction for the crime committed while on parole, they shall be sentenced to one of the named institutions; the second sentence to commence immediately after the first sentence has been served or annulled.

Procedure. As late as 1940 questions were being raised concerning the taxing of fees by the justice of the peace in favor of the prosecutor.²⁷ One act provided that in all cases when the prosecutor or his deputy attends and there is a finding of guilty, a fee of five dollars should be taxed in favor of the prosecutor.²⁸ Another act said that one of the prosecuting attorney's fees shall be a docket fee of five dollars before a justice of the peace on a plea of guilty or on conviction.²⁹ It was also provided that the prosecutor should appear in all cases in the courts of the justice of the peace when the law so provided, and the fees as provided should be charged and collected for the benefit of the general fund of the county.³⁰

Chapter 265 should help clarify these sections.³¹ It is now provided that the justice or any city judge before whom a defendant is brought must notify the prosecuting attorney or his deputy of the proceeding if either is present within the county or *circuit*.³² The prosecutor or his deputy must be given an opportunity to be present if they are within the county or circuit. It is also now provided that in all cases where there is a plea of guilty, or a finding of guilty, a fee of five dollars shall be taxed in favor of the prosecutor, for the use of the county. It is submitted that under the new

27. In construing Ind. Stat. Ann. (Burns, Repl. 1942) § 9-706 with Ind. Stat. Ann. (Burns, 1933) §49-2511, the Attorney General said "... it is the duty of the justice of peace to notify the prosecuting attorney of the proceeding, whether the plea may be guilty or not guilty, giving the prosecuting attorney a reasonable opportunity to be present. If he or his deputy does appear and defendant pleads guilty or is convicted, a docket fee of \$5.00 should be taxed. If he does not appear either in person or by deputy, no fee should be taxed." Ops. Att'y Gen., Ind. (1940) p.23.

28. Ind. Stat. Ann. (Burns, Repl. 1942) § 9-706.

29. Ind. Stat. Ann. (Burns, 1933) § 49-2511.

30. Ind. Stat. Ann. (Burns, Supp. 1945) § 49-2695.

31. Chapter 265, Acts of 1947 amends Ind. Stat. Ann. (Burns, Repl. 1942) § 9-706. See n. 27 *supra*.

32. Ind. Stat. Ann. (Burns, Repl. 1942) § 9-706 provided that the prosecutor or his deputy must be notified if either was within the county. The new amendment adds the words "or circuit."

law, if there is a plea of guilty or finding of guilty, it is not necessary for the prosecuting attorney or his deputy to be present in order to have the five dollar fee taxed in favor of the prosecutor for the use of the county.

Disposition of Property Seized by Warrant. Chapter 188 is amendatory in character and changes the previous statute³⁴ by requiring *immediate* delivery to the sheriff of the county by the justice of the peace, judge or officer having custody of property or things seized under a warrant executed by the seizure. Failure to deliver the property or things seized to the sheriff is a misdemeanor and is punished by a fine in any sum not exceeding five hundred dollars.³⁵

EMINENT DOMAIN

Chapter 39 provides that: (1) Municipalities or other political subdivisions of adjoining states may acquire land in Indiana for the purpose of operating airports or other aerial navigation facilities; (2) Indiana municipalities and political subdivisions are empowered to acquire land in adjoining states for such uses; (3) The municipalities and political subdivisions of adjoining states may cooperate with those of Indiana in establishing and maintaining joint facilities. Section 2 of the act, granting a municipality or political subdivision of an adjoining state the power of eminent domain in acquiring lands in Indiana, raises a serious constitutional question.¹ Whether the operation of Section 2 of the instant act in fact affords a benefit to the people of Indiana determines the validity of the taking as a "public use" within the meaning of accepted constitutional construction.

The exercise of eminent domain is an essential power of sovereignty, and is limited, not conferred, by the constitution.²

33. Ind. Stat. Ann. (Burns, Repl. 1942) § 9-604.

34. There seems to be a commendable policy for the change. Punishing public officers for failing to perform their duties efficiently should help improve local administration.

1. Ind. Acts 1947, c. 39, §2. "Such municipality or other political subdivision of an adjoining state shall have all the rights, privileges, and duties of like municipalities and political subdivisions of this state, including the right to exercise the right of eminent domain in accordance with the laws of this state as to property not devoted to public use. . ." It is clear that the last phrase must be read to mean "property not already devoted to public use," as public use is a definite limitation in Indiana. See note 4, *infra*.

2. Great Western Nat. Gas etc. Co. v. Hawkins, 30 Ind. App. 557, 565, 66 N. E. 765, 768 (1903).